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No. 92-1500

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1992

Paul Caspari, Superintendent of
the Missouri Eastern Correctional Center,
and Jeremiah W. (Jay) Nixon,
Attorney General of Missouri,
Petitioners,
v.
Christopher Bohlen,
Respondent,

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Eighth Circuit**

# Reply Brief for Petitioners

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## I.

## RESPONDENT REQUESTS THAT THE COURT RETROACTIVELY APPLY ANY HOLDING THAT THE DOUBLE JEOPARDY CLAUSE APPLIES TO NON-CAPITAL SENTENCING PROCEEDINGS AND REQUESTS THIS COURT TO CREATE AND APPLY A NEW RULE OF CONSTITUTIONAL LAW REGARDING RETROACTIVITY IN HABEAS CORPUS PROCEEDINGS.

This reply brief will discuss the retroactivity that respondent discussed in his brief. Respondent contends that he meets the two exceptions to the prohibition of retroactive application of new rules in habeas corpus proceedings. Petitioners will demonstrate that respondent does not fall within these two limited exceptions.

If this Court were to extend double jeopardy protection to non-capital sentencing enhancement proceedings, this extension would create new law since it "breaks new ground or imposes a new obligation on the State or Federal Government." *Teague v. Lane,* 489 U.S. 288, 301 (1989). Although respondent contends that the application of double jeopardy to non-capital sentence enhancement proceedings is not a new rule, petitioners disagree. The applicaiton of the Double Jeopardy Clause to non-capital sentencing enhancement proceedings is not dictated by past precedents of this Court. *See Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988).

Respondent alleges that even if this Court

determines that the Court of Appeals decision was not dictated by existing precedent, respondent would still be entitled to the benefit of any new law extending double jeopardy to non-capital sentencing proceedings because such a new rule is encompassed by the two exceptions enunciated in *Teague v. Lane*, *supra*.

In *Teague v. Lane*, *supra*, a plurality of this Court announced the standard for determining whether new rules of constitutional law will be given retroactive effect in federal habeas proceedings. The Court held that new rules of constitutional law will not be given retroactive effect in cases on collateral review unless the rule falls within one of two narrow exceptions. *Id.*, 489 U.S. at 310. The first exception states that:

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

*Teague v. Lane*, 489 U.S. at 307, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.).

In relying on the first exception in *Teague*, respondent cites to *McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991), *vacated*, 112 S.Ct. 1658 (1992), *on remand*, 975 F.2d 437 (1992), *petition for cert. filed* 61 U.S.L.W. 3653 (U.S. March 10, 1992) (No. 92-1465). Respondent claims that the Double Jeopardy



Clause's prohibition against successive prosecution is a categorical guarantee of the Constitution. Although the Eleventh Circuit agreed with the Eighth Circuit's holding in *McIntyre*, *supra*. *See Johnson v. Howard*, 963 F.2d 342 (11th Cir. 1992), the Second Circuit, in *United States v. Salerno*, 964 F.2d 172 (2d Cir. 1992), expressly rejected the Eighth Circuit's holding in *McIntyre*.

> As we have observed, *McIntyre* has been vacated and remanded by the Supreme Court for reconsideration in light of *Felix*. *See, supra* n. 2. In any event, we disagree with the Eighth Circuit's analysis of [retroactivity].

*United States v. Salerno*, 964 F.2d at 78. The plurality opinion in *Teague v. Lane, supra,* quotes Justice Harlan's concurrence in *Mackey v. United States*, 401 U.S. at 692. In *Mackey*, Justice Harlan identified several examples for the exception that a new rule of law will be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 490 U.S. at 311. These examples include rules that preclude prosecution of: 1) expressive conduct protected by the First Amendment, *Street v. New York*, 394 U.S. 576 (1969); 2) silence protected by the Fifth Amendment, *Grosso v. United States*, 390 U.S. 62 (1968); 3) certain protected intimate behavior, *Loving v. Virginia*, 388 U.S. 1 (1967); and

4) conduct in the constitutionally protected privacy of one's home, *Stanley v. Georges*, 398 U.S. 557 (1969).

Since Respondent's requested new rule does not involve decriminalization of robbery or a prohibition of enhanced sentencing for prior and persistent offenders, the first exception from *Teague* is simply inapplicable. Respondent contends that the fundamental guarantees of double jeopardy are so steeped in tradition that it protects him from being retried as a prior and persistent offender. Respondent also contends that the first exception in *Teague* prohibits the imposition of punishment on a certain class of offender. Petitioners disagree.

Respondent's argument assumes that a repeat offender falls within a protected class. However, respondent cannot seriously contend that the punishment of recividists is a "'certain [kind] of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 490 U.S. at 311. Repeat offenders or those involved in continuing criminal enterprise do not engage in "private individual conduct" that is beyond the power of legislatures to prohibit. Repeat offenders have been, and should be, punished more severely than first time offenders. Therefore, respondent's contention that he falls within the first exception in *Teague* is without merit.

Respondent also claims that he falls within the second exception in *Teague*. The second



exception to the *Teague* retroactivity analysis states:

> [A] new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty'".

*Teague v. Lane*, 489 U.S. at 307, *quoting Mackey v. United States*, 401 U.S. at 692.

The plurality opinion departed from Justice Harlan's approach in the second exception. Justice O'Connor's opinion narrowed Justice Harlan's second exception to include only those procedures "without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 489 U.S. at 313 (O'Connor, J., concurring).

Again, respondent argues that he meets this exception because the Double Jeopardy Clause is a "bedrock procedural protection implicit in the concept of ordered liberty" (Resp.Br. at 28).[1] Respondent contends that allowing the State to attempt repeatedly to prove prior and persistent offender status would jeopardize the reliability of the

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[1]Petitioners disagree with respondent's contention that the Double Jeopardy Clause is a "bedrock procedural protection implicit in the concept of ordered liberty" (Resp.Br. at 28). Since Double Jeopardy can be waived by pleading guilty, *United States v. Brose*, 488 U.S. 563 (1989), it cannot be an implicit "bedrock" protection.

resentencing. Petitioners again disagree.

The argument that the Double Jeopardy Clause's application to non-capital sentence enhancement proceedings is implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously limited is without merit. Allowing a State a second opportunity to show a defendant's status as a prior and persistent offender does not diminish the likelihood of an accurate conviction or sentence. If a defendant did not have prior convictions, the state would never be able to prove a prior and persistent status. The state cannot fictitiously allege that a defendant is a prior and persistent offender. The state would have to prove that a defendant has prior convictions whether that proof is by a preponderance of the evidence or beyond a reasonable doubt. In most cases, as respondent admits, this will be established through court records from a defendant's prior proceedings. The use of these records, whether during the first proceeding or a proceeding after a remand, does not diminish the likelihood of an accurate conviction, but rather ensures the finding of a prior and persistent status is accurate.

Nothing in respondent's proposed new rule rises to the level contemplated by this Court when it refined the exceptions. Respondent's proposed new rule is not of the same character as the rule against a



mob trial or the right to counsel.

Since the requirement that a defendant is a prior and persistent offender ensures an accurate conviction, petitioner does not establish that he meets the second exception of *Teague*.

## CONCLUSION

Petitioners pray that this Court reverse the United States Eighth Circuit Court of Appeals' holding extending the application of *Bullington* to non-capital sentencing proceedings. Furthermore, petitioners request that this Court overrule its' decision in *Bullington* and hold that the Double Jeopardy Clause does not apply to capital or non-capital sentencing proceedings.

Respectfully submitted,

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